THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PHILADELPHIA PLAZA–PHASE II, Plaintiff	:	April Term, 2002
	:	No. 3745
v.	:	
	:	Commerce Case Program
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Defendant	:	Control No.: 050357

OPINION

Defendant Bank of America National Trust and Savings Association ("BOA") has filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiff Philadelphia Plaza–Phase II ("Plaza"). For the reasons set forth in this Opinion, the Court has overruled the Objections.

BACKGROUND

Plaza owns and operates Two Commerce Square ("Property"), a 41-story commercial office building located in the Philadelphia Center City business district. In 1990, BOA extended a multi-million dollar loan to Plaza in a series of promissory notes ("Notes") to finance construction of the Property. This transaction, the terms of which were subsequently modified, is currently governed by an Amended and Restated Loan Agreement, dated March 27, 1996 ("Agreement").

Section 7.4 of the Agreement governs insurance and states, in relevant part, as follows:

> 7.4 Insurance. Borrower shall maintain the following insurance:
>
> (a) Special form property damage insurance on the Property, with a policy limit in an amount not less than the full insurable value of the Property on a replacement cost basis,

> including tenant improvements, if any. The policy shall include a business interruption (or rent loss, if more appropriate) endorsement in the amount of twelve months' projected income from the Property, taxes and insurance premiums, a lender's loss payable endorsement (438 BFU, or its equivalent) in favor of Bank, and any other endorsements required by Bank.
>
> (b) Commercial General Liability coverage with such limits as Bank may reasonably require. This policy shall name Bank as an additional insured. Coverage shall be written on an occurrence basis, not claims made.
>
> (c) Such other insurance as Bank may require, which may include flood insurance if the Property is situated in an area designated as "flood prone," "within a flood plain" or similar designation under federal or state law.

Compl. Ex. A. § 7.4. In the event that Plaza fails to secure the insurance required by the Agreement, BOA may procure the requisite insurance, demand reimbursement and add premium charges to the amount outstanding under the Notes. Id.

In accordance with the Agreement's terms, Plaza has maintained an "all-risk" insurance policy ("Policy") on the Property with aggregate coverage of $650 million, of which approximately $248 million is allocable to the Property. However, the renewal of the Policy that was issued after the tragedy of September 11, 2001 excludes coverage for terrorism except for a special sub-limit that allows recovery of $100,000 per occurrence per property per year for terror-related claims. On April 10, 2002, BOA advised Plaza that the proposed renewal of the Policy was unacceptable and demanded that Plaza obtain additional terrorism insurance coverage in an amount equal to the full replacement value of the Property of $248 million, exclusive of other properties covered by the Policy ("Terrorism Insurance"). BOA further demanded that the Terrorism Insurance be in place by April 25, 2002.

Although it contends that the Agreement does not grant BOA the right to force the purchase of the Terrorism Insurance, Plaza nevertheless investigated the possibility of complying with BOA's demands. According to Plaza, its preliminary inquiries revealed that the Terrorism Insurance may not be available with respect to the Property alone, that premiums will be prohibitively expensive and that properties comparable to the Property are not covered by insurance similar to the Terrorism Insurance BOA demanded. When Plaza requested additional time to investigate further, BOA denied the request and threatened to secure the $248 million Terrorism Insurance itself and to demand immediate reimbursement of the premium from Plaza.

In the Complaint, Plaza asserts that BOA's actions constitute a breach of the covenant of good faith and fair dealing implied in the Agreement. On this basis, it has brought a single claim for a declaratory judgment stating that its existing Policy is sufficient coverage under the Agreement. BOA has countered with the Objections, which challenge the legal sufficiency of Plaza' claim.

DISCUSSION

Although the Objections present arguments that may be persuasive at a later point in time, the requirement that the Court treat the allegations in the Complaint as true precludes the Court from sustaining them now. Accordingly, the Objections are overruled.

I. The Complaint Alleges a Breach of the Covenant of Good Faith and Fair Dealing Implied in the Agreement

The language of the Agreement grants BOA the option to require Plaza to purchase "other insurance." However, the implied covenant of good faith and fair dealing,[1] which is implied in every contract, bars BOA from exercising its discretion in an unfettered manner and limits its right to impose additional insurance mandates on Plaza. Because the Complaint alleges that BOA has acted impermissibly, Plaza has presented a viable cause of action.

A. The Agreement Includes an Implied Covenant of Good Faith and Fair Dealing

Pennsylvania courts have recently been plagued by a dispute as to whether the covenant of good faith is implied in all contracts or only those contracts evidencing a "special relationship" between the contracting parties. For the reasons discussed infra, the "special relationship" requirement is without any basis in Pennsylvania, and the Agreement includes an implied covenant of good faith and fair dealing.

The principle that a covenant of good faith is implied in every contract is a well-established axiom of Pennsylvania law. State and federal courts interpreting Pennsylvania law have stated that "[e]very contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Donahue v. Federal Exp. Corp., 753 A.2d 238, 242 (Pa. Super.

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[1] It is important to distinguish among different types of good faith. Here, the Court's discussion of the covenant of good faith addresses claims that arise in contract only and does not confront insurance bad faith or the common law tort of bad faith that has emerged in other jurisdictions. Cf. Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989) ("Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts."), with D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 494 Pa. 501, 431 A.2d 966 (1981) (rejecting Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), which allowed insured to bring a claim in tort against insurer for bad faith), and 42 Pa. C.S. § 8371 (allowing an insured to bring a statutory claim against an insurer for bad faith).

Ct. 2000) (citation omitted). See also Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001) ("Under Pennsylvania Law, a covenant of good faith and fair dealing is implied in every contract."); Somers v. Somers, 418 Pa. Super. 131, 613 A.2d 1211 (1992) (holding that plaintiff could proceed on breach of the covenant of good faith implied in an employment contract); Liazis v. Kosta, Inc., 421 Pa. Super. 502, 510, 618 A.2d 450, 454 (1992) ("[E]very contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract."). A recent Pennsylvania Superior Court decision discussed the covenant of good faith as follows:

> Section 205 of the Restatement (Second) of Contracts, which was adopted by this Court in Baker v. Lafayette College, 350 Pa. Super. 68, 84, 504 A.2d 247, 255 (1986), aff'd., 516 Pa. 291, 532 A.2d 399 (1987), and Creeger Brick & Building Supply, Inc. v. Mid-State Bank & Trust Company, 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989), provides: "Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts, § 205. A similar requirement has been imposed upon contracts within the scope of the Uniform Commercial Code (UCC) by 13 Pa.C.S.A. section 1203. Somers v. Somers, 418 Pa. Super. 131, 135, 613 A.2d 1211, 1213 (1992). "Good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." 13 Pa.C.S.A. § 1201. The breach of the obligation to act in good faith cannot be precisely defined in all circumstances, however, examples of "bad faith" conduct include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Somers, 613 A.2d at 1213 (citing Restatement (Second) of Contracts, § 205(d)).

Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 721-22 (1996).[2]

[2] Other Pennsylvania decisions, including at least one decision by the Pennsylvania Supreme Court, have adopted Section 205 as well. See, e.g., Bethlehem Steel Corp. v. Litton Indus., Inc., 507 Pa. 88, 125, 488 A.2d 581, 600 (1985); Baker v. Lafayette College, 350 Pa. Super. 68, 84, 504 A.2d 247, 255 (1986), aff'd, 516 Pa. 291, 532 A.2d 399 (1987).

Recently, this principle has been challenged. A number of courts interpreting Pennsylvania law have found that the covenant of good faith is not implicated in every contractual relationship:

> In Pennsylvania, the courts have recognized the duty of good faith only in limited situations. Creeger; Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3rd Cir. 1993). More specifically, the duty of good faith may not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties. Department of Transportation v. E-Z Parks, Inc., 153 Pa. Cmwlth. 258, 620 A.2d 712 (1993), appeal denied, 534 Pa. 651, 627 A.2d 181 (1993); USX Corp. v. Prime Leasing, Inc., 988 F.2d 433 (3rd Cir. 1993); Allstate Transportation Co. v. Southeastern Pennsylvania Transportation Authority, 2000 WL 329015 (E.D. Pa., No. Civ.A. 97-1482, filed March 27, 2000).

Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa. Commw. Ct. 2001). See also Benevento v. Life USA Holding, Inc., 61 F. Supp. 2d 407, 424 (1999) ("[U]nder Pennsylvania law, every contract does not imply a duty of good faith. Instead, the duty of good faith and fair dealing is limited to special types of contracts, involving special relationships between the parties."). Thus, under this aberrant line of cases, only contracts that entail a "special relationship" give rise to the covenant of good faith.

This Court agrees with those decisions holding that a covenant of good faith is implied in every contract. As an initial matter, the requirement that a special relationship exist between the parties before the covenant of good faith arises has unclear origins. This requirement was first imposed in E-Z Parks, Inc. in 1993:

> Pennsylvania courts have recognized a separate duty of good faith performance of contracts only in limited circumstances. Creeger Brick v. Mid-State Bank, 385 Pa. Superior Ct. 30, 560 A.2d 151 (1989). This duty of good faith is limited to situations where there is some special relationship between the parties, such as a confidential or

> fiduciary relationship. A confidential relationship exists when "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other." Estate of Clark, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976). (citation omitted).

153 Pa. Commw. at 268, 620 A.2d at 717. Notably, there is no citation to support the conclusion that a special relationship is necessary. Moreover, those courts outside the Commonwealth that have imposed a special relationship requirement have done so only when examining whether a plaintiff may bring a tort or tort-like claim based on a breach of the covenant of good faith. See, e.g., Freeman & Mills v. Belcher Oil Co., 900 P.2d 669, 676 (Cal. 1995). Cf. Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 414, 430-31 (3d Cir. 1993) (distinguishing between covenant of good faith and duties arising from a fiduciary or confidential relationship); Steven J. Burton & Eric G. Anderson, Contractual Good Faith: Formation, Performance, Breach, Enforcement § 9.2.3 n.28 (1995) ("To avoid misunderstanding, requirements of contractual good faith do not depend on a fiduciary relationship.").[3]

Holding that the implied covenant of good faith arises in every contractual relationship finds support from outside the jurisdiction more broadly as well. As noted supra, Section 205 of the Restatement (Second) of Contracts states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." This principle has been widely adopted by state and federal courts alike. See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co., 680 F.2d 933, 941 (3d Cir. 1982); Kleiner v. First Nat'l Bank of Atlanta, 581 F. Supp.

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[3] The one exception to this rule is Texas. Under Texas law, good faith obligations are implied in a contract only where there is a special relationship, but a party's breach of its good faith obligations automatically give rise to a tort claim. See Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex.1987).

955, 960 n.5 (N.D. Ga. 1984); Mitford v. de Lasala, 666 P.2d 1000, 1006 (Alaska 1983); Central New Haven Dev. Corp. v. La Crepe, Inc., 413 A.2d 840, 843 (Conn. 1979). Moreover, the Uniform Commercial Code, as adopted in Pennsylvania and elsewhere, echoes this sentiment, states that "'[e]very contract or duty within this title imposes an obligation of good faith in its performance or enforcement." 13 Pa. C.S. § 1203.

Many courts have relied on Creeger Brick for their limited application of the implied covenant of good faith. These courts misunderstand and overstate Creeger Brick's holding. Rather, Creeger Brick held solely that the facts presented did not give rise to a tort claim for breach of the covenant of good faith:

> It seems reasonably clear from the decided cases that a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor. The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. A lending institution also is not required to delay attempts to recover from a guarantor after the principal debtor has defaulted. Finally, if the bank in this case falsely represented appellants' financial circumstances to other creditors for the purpose of damaging appellants' ability to continue doing business, appellants may have causes of action in tort for slander, misrepresentation, or interference with existing or prospective contractual relations. There is no need in such cases to create a separate tort for breach of a duty of good faith.

385 Pa. Super. at 36-37, 560 A.2d at 154. This limited holding does not justify the conclusion that the covenant of good faith is inherent in some contracts, but absent from others.

This is not to say that the implied covenant of good faith can override the express terms of a contract. On the contrary, it is axiomatic that the covenant of good faith does nothing more than fill in

those terms of a contract that have not been expressly stated. See, e.g., Stonehedge Sq. L.P. v. Movie Merchants, Inc., 454 Pa. Super. 468, 480, 685 A.2d 1019, 1025 (1996), aff'd, 715 A.2d 1082 (holding that the implied covenant of good faith cannot vary the express terms of a contract). Cf. Reading Terminal Merchants Ass'n v. Samuel Rappaport Assocs., 310 Pa. Super. 165, 176, 456 A.2d 552, 557 (1983) ("There can be no implied covenant as to any matter specifically covered by the written contract between the parties."); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 198, 519 A.2d 385, 388 (1986) ("The law will not imply a contract different than that which the parties have expressly adopted."). In addition, the question of what constitutes a breach of the covenant will depend greatly upon the scenario presented and will vary from situation to situation. Nevertheless, parties owe each other a contractual obligation of good faith, even where those parties do not have a "special relationship."

BOA has cited a number of cases that supposedly stand for the proposition that the covenant of good faith does not arise in a creditor-lender relationship. Each of these cases purports to rely on the Superior Court's ruling in Creeger Brick, and, to the extent that they advance BOA's argument, they are in error. Creeger Brick spoke not to whether the implied covenant of good faith was present in a creditor-lender relationship. Rather, the Superior Court held that "it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself," and that the availability of other remedies obviated the "need . . . to create a separate tort for breach of a duty of good faith." 385 Pa. Super. at 37, 560 A.2d at 154. Those decisions relying on Creeger Brick to avoid the covenant of good faith and to narrow its application appear to confuse the existence of the covenant with the alleged breach of the covenant and to expand Creeger Brick into

unintended areas. Compare Fellheimer v. Maryland Nat'l Bank, No. Civ. A. 93-2670, 1994 WL 2525, at *7 (E.D. Pa. Jan. 6, 1994) ("[A] lender does not breach an implied contractual duty of good faith by adhering to the terms of its contract with a borrower.") with Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 319 (E.D. Pa. 1992) ("While Pennsylvania recognizes an implied contractual duty of good faith in limited situations, it has refused to do so in the lender/borrower relationship."). Thus, Creeger Brick cannot be read as supporting BOA's position or validating those courts that have held that this covenant is not implied in every contract. Accordingly, the Agreement includes an implied covenant of good faith.

B. The Complaint Alleges Facts to Support Plaza's Claim That BOA Breached the Implied Covenant of Good Faith

As noted supra, it is difficult to give a generalized statement that describes all breaches of the covenant of good faith, but examples of breaches include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Somers, 613 A.2d at 1213. The covenant of good faith may also be breached when a party exercises discretion authorized in a contract in an unreasonable way. See Burke v. Daughters of the Most Holy Redeemer, Inc., 344 Pa. 579, 581, 26 A.2d 460, 461 (1942) ("[T]he test of adequate performance is not whether the person for whom the service was rendered ought to be satisfied, but whether he is satisfied, there being, however, this limitation, that any dissatisfaction on his part must be genuine and not prompted by caprice or bad faith."); Singerly v. Thayer, 108 Pa. 291, 2 A. 230 (1885) ("To justify a refusal to

accept the [product] on the ground that it is not satisfactory, the objection should be made in good faith. It must not be merely capricious.").

The legitimacy of Plaza's claim hinges on Section 7.4(a) and (c), each of which require Plaza to maintain certain types of insurance. Under the first subsection, the question is whether the phrase "[s]pecial form property damage insurance" includes insurance against a terrorist attack. Under subsection (c), the question is whether BOA has exercised its discretion reasonably and without caprice by requiring Plaza to purchase terrorism insurance. If BOA prevails on either of these questions, Plaza's claim must be dismissed.

Based on the allegations presented in the Complaint, the Court has only moderate difficulty finding that BOA breached the covenant of good faith implied in the Agreement by deeming "other insurance" to include terrorism insurance. Plaza asserts that the Terrorism Insurance is "probably unavailable, or if available, is cost prohibitive and commercially unreasonable." Compl. ¶ 28. Because Plaza's leases with Property tenants mandate that the cost of the Terrorism Insurance would be passed on to Property tenants, the expense would constitute "an enormous competitive disadvantage when compared to the other office buildings in Center City Philadelphia, which are not burdened with exorbitant and exclusive terrorism insurance." Id. ¶ 29. As an additional matter, the Terrorism Insurance BOA demands would apply solely to the Property, in contrast to previous insurance policies that insured all of Plaza's properties. Id. ¶ 26. By allegedly rejecting Plaza's request for an extension of time to investigate the feasibility of obtaining such insurance, BOA has exacerbated its breach. Id. ¶¶

31-32. These allegations, which the Court must accept as true at this stage,[4] support Plaza's claim that BOA's demand's for the Terrorism Insurance as "other insurance" may be unreasonable and a breach of the implied covenant of good faith.[5]

Similarly, there is no indication, whether express or otherwise, that the "[s]pecial form property damage insurance" specifically includes insurance against terror attacks, whether separate or as a component. Because the scope and depth of this type of insurance are not defined and are open to more than one reasonable meaning,[6] the term is ambiguous and cannot be decided as a matter of law. If no ambiguities are found, the court may regard the interpretation of the contract as a question of law. See Lapio v. Robbins, 729 A.2d 1229, 1232 (Pa. Super. Ct. 1999) ("[U]nambiguous terms of a

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[4] For the purposes of reviewing the legal sufficiency of a complaint, a court must "treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom." Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000).

[5] If, indeed, BOA's actions are as alleged in the Complaint, the general unavailability of terrorism insurance makes its conduct even more unreasonable. See Editorial, Insuring Against Terrorism, N.Y. Times, June 8, 2002, at A13 ("[S]ome insurance companies and reinsurers have stopped providing terrorism coverage altogether; many others are charging astronomical premiums for very limited coverage."); Companies Are Increasingly Unable to Find Sufficient Terrorism Insurance, SEC Filings Insight, Mar. 18, 2002, at 1.

[6] In general, "a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy." Insurance Co. of Evanston v. Bowers, 758 A.2d 213, 220 (Pa. Super. Ct. 2000) (citing Antanovich v. Allstate Ins. Co., 507 Pa. 68, 76, 488 A.2d 571, 575 (1985)). Under Pennsylvania law, a contract is ambiguous "when a contract provision is reasonably susceptible to more than one meaning." West Conshohocken Restaurant Assocs., Inc. v. Flanigan, 737 A.2d 1245, 1248 (Pa. Super. Ct. 1999) (citation omitted). A court must not "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999) (citing Steuart v. McChesney, 498 Pa. 45, 53, 444 A.2d 659, 663 (1982)). See also Tuthill v. Tuthill, 763 A.2d 417, 420 (Pa. Super. Ct. 2000) ("The fact that the parties have different interpretations of a contract does not render the contract ambiguous.").

contract are construed by a court as a matter of law."). Moreover, to the extent BOA has abused its power in defining special form property damage insurance and has attempted to foist an unreasonable definition on Plaza,[7] it has acted in violation of its good faith obligations.

BOA contends that, in the past, the Parties have not adhered to an interpretation of this term that required Plaza to obtain discrete terrorism insurance for the Property. Id. ¶ 26. To the extent that insurance against incidents of terror was included in prior versions of the Policy, this allegation is not a part of the Complaint and therefore cannot be considered here. See Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 160, 184 A. 17, 19 (1936) ("A speaking demurrer is bad."); Eckell v. Wilson, 409 Pa. Super. 132, 136 n.1, 597 A.2d 696, 698 n.1 (1991) (noting that "a demurrer cannot be a 'speaking demurrer' and cannot be used to supply a fact missing in the complaint").[8] Thus, the Complaint presents a complete and sustainable claim for breach of the covenant of good faith implied in the Agreement.

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[7] The conditions that render BOA's actions and proposed definition unreasonable could be similar to those that render its alleged conduct inappropriate in conjunction with subsection (c). These conditions may include the change in circumstances stemming from tragedy of September 11, 2001 and how the Parties would have addressed this change. Cf. Laudig v. Laudig, 425 Pa. Super. 228, 233, 624 A.2d 651, 653 (1993) (In determining the intent of the contracting parties, a court must "adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement" by examining "the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement.").

[8] The Court cautions that its decision is based on the fact that it must accept the allegations in the Complaint as true for the purposes of preliminary objections. There is a strong possibility that, at a later stage under a different procedural posture, Plaza will not prevail.

II. The Complaint Presents a Justiciable Claim

Although BOA does not challenge the justiciability of Plaza's claim,[9] Plaza articulates a defense as to why the Complaint presents a controversy that the Court may address. Plaza's argument has merit, and the Court may assess Plaza's request for a declaratory judgment.

The purpose of Pennsylvania's Declaratory Judgment Act[10] "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." 42 Pa. C.S. § 7541(a). However, there are limitations as to when a court may address a request for a declaratory judgment:

> A declaratory judgment to decide future rights will not issue in a case where the alleged breach of the petitioner's rights is merely an anticipated event which may never happen and a petition for declaratory judgment is properly dismissed where the proceeding may prove to be merely academic. McCandless Township v. Wylie, 375 Pa. 378, 381-82, 100 A.2d 590, 592 (1953), citing Eureka Casualty Co. v. Henderson, 371 Pa. 587, 92 A.2d 551 (1952). While the subject matter of the dispute giving rise to a request for declaratory relief need not have erupted into a full-fledged battle, petitioner must at least allege facts demonstrating the existence of an active controversy relating to the invasion or threatened invasion of the petitioner's legal rights; there must emerge the "ripening seeds" of a controversy. In re Cryan's Est., 301 Pa. 386, 152 A. 675 (1930).

Ronald C. Clark, Inc. v. Township of Hamilton, 128 Pa. Commw. 31, 36, 562 A.2d 965, 967-68 (1989). See also Allegheny County Constables Ass'n, Inc. v. O'Malley, 108 Pa. Commw. 1, 5, 528 A.2d 716, 718 (1987) (reviewing requirements for declaratory judgment claim); South Whitehall Twp. v. Commonwealth, Dept. of Transp., 82 Pa. Commw. 217, 222, 475 A.2d 166, 169 (1984) ("For declaratory relief to be appropriate, there must exist an actual controversy."). More specifically, a

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[9] Indeed, BOA agrees with Plaza that this dispute is a justiciable dispute that the Court may address. Tr. of Oral Arg., June 3, 2002 3-4.

[10] 42 Pa. C.S. §§ 7531-7541.

claim must be justiciable, which requires that a claimant's interest be "a direct, substantial and present interest, as contrasted with a remote or speculative interest." Chester Upland Sch. Dist. v. Commonwealth, 90 Pa. Commw. 464, 495 A.2d 981 (1985) (citing Kaufmann v. Osser, 441 Pa. 150, 155, 271 A.2d 236, 239 (1970)) (quotation marks omitted). See also Wagner v. Apollo Gas Co., 399 Pa. Super. 323, 327, 582 A.2d 364, 366 (1990) ("[A] plaintiff must demonstrate an 'actual controversy' indicating imminent and inevitable litigation, and a direct, substantial and present interest.").

When measured against these requirements, it becomes clear that the Complaint sets forth a justiciable claim. BOA has demanded that Plaza obtain terrorism insurance and has rejected Plaza's request for an extension of time to investigate the feasibility of obtaining such insurance. Compl. ¶¶ 26, 31-32. Moreover, BOA has threatened to purchase such insurance and to charge the premium costs to Plaza with an immediate demand for payment. Id. ¶ 33. Plaza's failure to pay such costs would allow BOA to declare that Plaza had defaulted under the Agreement. Id. ¶ 34. These allegations support finding that there is an actual controversy between the Parties and that Plaza has presented a justiciable claim.[11]

[11] This conclusion is bolstered by the representations made by the Parties at oral argument before the Court. According to the Parties, since the filing of the Complaint, Plaza has secured a terrorism insurance policy with $100 million in coverage. In addition, BOA has obtained $91 million in terrorism insurance for the Property at a cost of $445,000. BOA has demanded immediate payment for this sum as it claims the terms of the Agreement authorize it to do. Tr. of Oral Arg., June 3, 2002 3-4.

CONCLUSION

The Court has significant reservations about whether Plaza will be able to sustain its claim at a later stage in this litigation. However, for the purposes of the Objections, its request for a declaratory judgment based on BOA's alleged breach of the covenant of good faith and fair dealing implied in the Agreement is legally sufficient.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: June 21, 2002

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PHILADELPHIA PLAZA–PHASE II,	:	April Term, 2002
Plaintiff	:	
	:	No. 3745
v.	:	
	:	Commerce Case Program
BANK OF AMERICA NATIONAL TRUST :		
AND SAVINGS ASSOCIATION,	:	Control No.: 050357
Defendant	:	

AND NOW, this 21st day of June, 2002, upon consideration of the Preliminary Objections of Defendant Bank of America National Trust and Savings Association to the Complaint of Plaintiff Philadelphia Plaza–Phase II and the Plaintiff's response thereto and oral argument held thereon, and in accordance with the reasons set forth in the contemporaneously issued Opinion, it is hereby ORDERED that the Objections are OVERRULED. The Defendant is directed to file an answer to the Complaint within 20 days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.